

Item 2

AMERICAN BAR ASSOCIATION

REPORT of the STANDING COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS

May, 1967

HUMAN-RIGHTS CONVENTIONS and RECOMMENDATIONS

RECOMMENDATION

WHEREAS one of the purposes of the United Nations, as expressed in the first Article of the Charter of that body, is "promoting and encouraging respect for human rights and for fundamental freedoms"; and

WHEREAS the United States of America has always stood for the unqualified protection, and, like other nations, favors the promotion, within every country of the world, of human rights and fundamental freedoms as expressed in the Charter of the United Nations; and

WHEREAS the American Bar Association unqualifiedly supports the position of the United States, in promoting, through the United Nations, within every country, "universal respect for, and observance of, human rights and fundamental freedoms for all"; and

WHEREAS the Charter of the United Nations further provides that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state"; and

WHEREAS it is the sense of the American Bar Association that many human rights sought to be secured by draft covenants or conventions completed, or in course of preparation, by the United Nations and its various organs, concern the relationship of the citizen to the government of his own country, and are accordingly "essentially within the domestic jurisdiction," and have no direct relationship to the external affairs of the United States; and

WHEREAS it is the position of the American Bar Association that such human rights as "are essentially within the domestic jurisdiction" of the United States should form the subject of recommendations of the United Nations, but not of international compacts;

NOW THEREFORE, BE IT RESOLVED by the American Bar Association that it supports fully, promotion by the United States, through the United

Nations, of "universal respect for, and observance of, human rights and fundamental freedoms" for all people within all countries; and

BE IT FURTHER RESOLVED that the American Bar Association favors recommendations by the United Nations on all human rights and fundamental freedoms, and that it favors also treaties on all such matters as relate to the external affairs of the United States; but that the Association opposes, in principle, accession by this country to, and ratification by it of, international covenants which seek to enforce the protection of human rights which lie essentially within the domestic jurisdiction of the United States; and

BE IT FURTHER RESOLVED that the Supplementary Slavery Convention, the Convention on the Abolition of Forced Labor and the Convention on the Political Rights of Women, now pending in the Senate of the United States for advice and consent to accession or ratification, being concerned with matters essentially within the domestic jurisdiction of the United States, except for the provision of the Supplementary Slavery Convention that "any slave who takes refuge on board any vessel of a State Party to this Convention should *ipso facto* be free," the American Bar Association opposes advice and consent to accession and/or ratification of said treaties; and

BE IT FURTHER RESOLVED that copies of this resolution be forwarded by the Secretary of this Association to the President of the United States, the Chairman and members of the Foreign Relations Committee of the United States Senate, and the Ambassador of the United States to the United Nations; and

BE IT FURTHER RESOLVED that the Chairman or other representatives of the Association's Standing Committee on Peace and Law Through United Nations be authorized to appear before appropriate committees of the Congress, and to co-operate with the executive departments of the Government of the United States, to present the views of the Association as herein expressed.

Editor's Note:

The length of this report has been reduced by eliminating (as indicated by triple asterisks) the conventions not yet signed by the United States. These and other reductions were made with the consent of Eberhard Deutsch who, after being appropriately browbeaten by the Editor, gave his reluctant consent. The main thrust of the report remains unimpaired.

REPORT

I

INTRODUCTION

The pendency, for ratification or accession by the United States, of four completed United Nations Conventions on human rights, the completion of a number of others not yet before the Senate, and the designation of 1968 as the International Year for Human Rights in honor of the Twentieth Anniversary of the Universal Declaration of Human Rights, have prompted the Committee to make a study of this subject, and to submit to the House of Delegates this Report and their Recommendation with regard thereto.

II

INSTRUMENTS BEFORE THE SENATE

There are four human-rights Conventions now before the United States Senate for advice and consent. None of these has as yet been approved.*

a. Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations in Paris on December 9, 1948, was signed on behalf of the United States on December 11, 1948, and was submitted by President Truman on July 16, 1949, to the Senate for advice and consent to ratification. Hearings on the Convention were conducted by a Sub-Committee of the Committee on Foreign Relations on January 23, 24, 25 and February 9, 1950.

Members of the Committee testified at these hearings, following which no action has ever been taken on the Genocide Convention by the Senate Foreign Relations Committee. At March 31, 1967, seventy other countries were parties to this Convention, which has been in force since January 12, 1951.

The parties to the Convention "undertake to enact, in accordance with their respective Constitutions, the necessary legislation . . . to provide effective penalties for persons guilty of" (a) genocide, defined as including, with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, (1) the killing of members of the group, (2) causing serious bodily or mental harm to members of the group, (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, (4) imposing measures intended to prevent births within the group, and (5) forcibly transferring children of the group to another group; (b) conspiracy to commit genocide; (c) incitement to commit genocide; (d) attempt to commit genocide; and (e) complicity in genocide.

When this Convention was being formulated, the representatives of the United States sought, as a fundamental "sine qua non" thereof, to have genocide, as an international crime, defined as having been committed "with the complicity of government." The United States representative then stated, unequivocally, that his "delegation felt in fact that genocide could not be an international crime unless a government participated in its perpetration."

But this position, in which the United Kingdom concurred, was voted down, and the United States gave way. The Convention, as drawn, contains no requirement of governmental participation to constitute genocide. The offense can be committed only by individuals, "whether they are constitutionally responsible rulers, public officials or private individuals."

Trial for the offense is to be before a competent tribunal of the nation in the territory of which the act was committed, "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction"; and the parties agree to grant extradition for the offense.

In 1949, the Association, while deploring genocide in the strongest terms, opposed ratification of the treaty on the ground that it raised "important con-

* Hearings have been held, in February and March, 1967, by a sub-committee on human-rights treaties of the Senate Foreign Relations Committee, on the Supplementary Slavery, Forced Labor and Women's Rights treaties. No action of any kind has been taken since 1950 on the Genocide Convention.

stitutional questions" not resolved by the treaty "in a manner consistent with our form of Government."

b. *Supplementary Slavery Convention*

This Convention was opened for signature at Geneva on September 7, 1956. It entered into force on April 30, 1957. As of March 31, 1967, 67 States were parties to it. It has not been signed by the United States. It supplements a Convention signed at Geneva on 25 September 1926, which was designed to secure the abolition of slavery and of the slave trade, and to which the United States is a party.

Under this Convention, each of the parties thereto is obligated to "take all practicable and necessary legislative and other measures to bring about . . . the complete abolition of abandonment of" (1) debt bondage; (2) serfdom (tenancy under which the tenant is bound to the soil, and is not free to change his status); (3) (a) a practice under which a woman, without a right to refuse, is given in marriage for a consideration, or (b) may be transferred by her husband or by his family or clan, or (c) may, on the death of her husband, be inherited by another person; and (4) a practice by which a person under 18 is delivered by his parents to another person for exploitation or labor.

Article 4 of the Convention provides that "any slave who takes refuge on board any vessel of a State Party to this Convention shall *ipso facto* be free."

President Kennedy's letter of transmittal of this treaty to the Senate for its advice and consent to accession thereto, was accompanied by a letter to him from Secretary of State Dean Rusk, who advised the President that "the substance of this Convention lies within the Federal power, and no substantial legal questions are involved, in as much as slavery through such practices is already forbidden in the United States under Federal and State laws. The Department of Justice and the Department of the Interior have expressed the view that the 13th amendment to the Constitution and existing Federal legislation are sufficient to meet the objectives and requirements of the convention."

c. *Abolition of Forced Labor*

This Convention was adopted at the Fortieth Session of the General Conference of the International Labor Organization at Geneva on June 25, 1957. As of March 31, 1967, 77 States were parties to it. It was submitted by President Kennedy on July 22, 1963, to the Senate for advice and consent to ratification, along with the Supplementary Convention on the Abolition of Slavery and the Convention on the Political Rights of Women.

The treaty provides that each ratifying member undertakes not to use, and to suppress all, forced or compulsory labor (a) as a means of political coercion, or as punishment for expressing views opposed to an established political, social or economic system; (b) as a means of mobilizing and using labor for economic development; (c) as a means of labor discipline; (d) as punishment for participation in strikes; or (e) as a means of racial, social, national or religious discrimination.

The United States delegation participated actively in the discussions in which the draft convention was formulated, and the Convention was adopted by the ILO General Conference by a vote of 240 to 0.

On its adoption, the United States Government representative stated that the United States would vote for the Convention because existing constitutional and legislative action already gave effect to its provisions. However, he added, under the United States constitutional system, the document was not suitable

or appropriate for a treaty. In the light of the vote of the Conference, the matter would be given further study by his Government. He added

"For nearly 100 years forced labour has been prohibited in the United States by constitutional amendment, which is the supreme law of the land, binding not only upon the federal Government but also upon the States. The United States is unalterably opposed to forced labour and wholeheartedly supports the objectives of the International Labour Organisation Convention on this subject. The United States will voluntarily make reports as contemplated by the Convention."

The United States employer representative abstained on the vote, stating that he was "unrelentingly opposed to the unspeakable evil of forced labor," but upheld the principle that "it is inappropriate to embody in an international draft treaty provisions governing the relationship of an individual to his own government." He believed that "international treaties are proper only when they deal with the relationship of a national or his government to foreign citizens or their governments."

Under paragraph 7(c) of Article 19 of the Constitution of the ILO, adoption of such a convention requires its submission by federal-state members to their appropriate federal authority for ratification and implementation if its subject matter is within the federal competence; and under paragraph 7(b) of the same constitutional Article (a federal-state clause), if the subject of the convention is within the competence of the states, the treaty is to be referred to both the appropriate state and federal authorities for consideration.

On February 9, 1959, the Convention on the Abolition of Forced Labor was submitted to both houses of Congress, under paragraph 7(b) of Article 19 of the ILO Constitution, by Secretary of State John Foster Dulles, with a letter from Secretary of Labor James P. Mitchell, suggesting that ratification was not deemed appropriate by various executive departments of government which had considered it, because "the ban on forced labor as a punishment for having participated in strikes raises problems of a technical legal character with regard to areas of State regulation."

Years later, however, Secretary of Labor Willard Wirtz wrote, on February 15, 1963, to Secretary of State Dean Rusk, stating that "after further study of the matter" by the executive departments concerned, it was their view "that the subject matter of ILO Convention 105 is wholly within the Federal competence under the 13th Amendment, and that paragraph 7(a) of article 19 is applicable to it." It was accordingly "recommended that this instrument be transmitted to the Senate with a view to receiving advice and consent as to its ratification."

On July 18, 1963, Secretary of State Rusk transmitted to the President, a copy of the letter he had received from Secretary of Labor Wirtz, stating that "in accordance with article 19, paragraph 7(a), of the Constitution of the International Labor Organization, the convention is submitted herewith for transmission to the Senate for advice and consent to ratification"; and, as stated, President Kennedy submitted the treaty to the Senate for ratification on July 22, 1963.

In his statement before a Sub-Committee of the Committee on Foreign Relations on February 23, 1967, Ambassador Goldberg said, with reference to this Convention:

"It is apparent from the drafting history that the agreement was not intended to preclude the application of penal sanctions for certain kinds of labor activities. Thus, the convention would have no applica-

tion to criminal sanctions for violations of court orders—such as those commonly issued under the National Labor Relations Act. Nor would it cast any doubt on punishment for illegal activities, for example, assaults, in connection with a strike. Nor, finally, would the convention apply to sanctions imposed for having participated in an illegal strike or for other illegal labor activities. The convention merely establishes that forced labor shall not be used as a punishment for those labor activities that are the inherent right of men everywhere and that are protected by our own Constitution and laws.

"It is axiomatic that forced labor cannot be imposed in this country as a result of labor strikes or activities that are legal. Forced labor can in no event be tolerated in the United States except as punishment for an act that has validly been classified as criminal."

It nevertheless cannot be gainsaid, despite this assurance, that one may not safely assume that some international, or even local, tribunal will never hold that imprisonment for participation in an illegal strike or in violation of an injunction against striking, is in violation of such a treaty provision prohibiting the imposition of forced labor "for participation in strikes."

In this connection, it must be of especial interest to note what appears to be a startling thesis espoused in a book recently published by Professor W. Paul Gormley of the University of Tulsa. It is entitled "The Procedural Status of the Individual before International and Supranational Tribunals."

This book states unequivocally that a "private individual must be able to prosecute an action before an international tribunal—in his own name—against an offending government, particularly his own. Unfortunately, this necessary right of action was not recognized under traditional international law."

d. Political Rights of Women

The third human-rights treaty submitted to the Senate on July 22, 1963, was the Convention on the Political Rights of Women, which was adopted by the General Assembly of the United Nations on March 31, 1963. As at January 1, 1967, 51 States had become parties to it.

The Convention provides that (1) women shall be entitled to vote in all elections; (2) that women shall be eligible for election to all publicly elected bodies of national law; and (3) that women shall be entitled to hold public office and to exercise all public functions, established by national law—all on equal terms with men, without any discrimination.

On July 18, 1963, the same day on which he sent the Slavery and Forced Labor Conventions to the President, Secretary of State Rusk transmitted to him this treaty on the Political Rights of Women, "with a view to its transmission to the Senate for the advice and consent of that body to accession." In his letter of transmittal, the Secretary said:

"No substantive legal questions are involved in the United States becoming a party to this convention. Article 1, relating to the right of women to vote, merely reflects the principle established by the 19th Amendment to the Constitution of the United States, which provides:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

In his statement before a Sub-Committee of the Committee on Foreign Relations on February 23, 1967, Ambassador Goldberg said, with reference to this Convention, that

"there is no doubt that Constitutional guarantees and legislation now in force already reflect the aims and purport of the convention. We need no additional laws to ensure that women shall, on equal terms with men, be entitled to vote in all elections, be eligible for election to all publicly elected bodies established by national law, and be entitled to hold public office and exercise all public functions established by national law."

* * * * *

"That the Constitution bars arbitrary discrimination against women in their eligibility for Federal elected bodies and in their right to hold Federal office or to exercise functions in the Federal Government cannot be doubted. On the other hand, categorizations dependent upon the natural differences between women and men are permitted under our Constitution, and I understand such categorizations to be permissible under the present convention. Thus, for example, the history of the convention established that the terms "public office" and "public functions" were not intended to apply to military service. In voting for the convention, the United States delegate, Mrs. Eleanor Roosevelt, stated the understanding of the United States in this regard, adding that we understood the term "public office" to be coterminous with "public function".

"If the Senate were to decide to give its advice and consent to United States accession to the convention, it might wish to indicate its understanding on these two points. Although I personally believe that this is not necessary, in light of Mrs. Roosevelt's statement, I would note that President Kennedy recommended such an understanding when he submitted the convention to the Senate in 1963."

III

COMMENTS ON INSTRUMENTS BEFORE THE SENATE

It will be remembered that submission of the Genocide Convention to the Senate was met with assertions that, despite the noble aims which had engendered the concept of the treaty, approval of the principle of employing international agreements to effect internal reforms would be setting a dangerous precedent.

In the course of a debate over a proposed constitutional amendment to limit the effect of treaties as internal law within the United States, John Foster Dulles, then Secretary of State, testified before a Sub-Committee of the Judiciary Committee of the Senate, which was conducting hearings on the proposal. In the course of his testimony, he said (Hearings, April 6, 1953, pp. 824-25):

"During recent years, there developed a tendency to consider treaty-making as a way to effectuate reforms, particularly in relation to social matters, and to impose upon our Republic conceptions regarding human rights which many felt were alien to our traditional concepts. This tendency caused widespread concern. . . .

"I believe that the concern was then a legitimate one. . . . But I point out that the arousing of that concern was a correction of the evil.

"There has been a reversal of the trend toward trying to use the treaty-making power to effect internal social changes. This administration is committed to the exercise of the treaty-making power only within traditional limits. . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.

* * * * *

"The present administration intends to encourage the promotion everywhere of human rights and individual freedoms, but to favor methods of persuasion, education and example rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community which has different standards. . . .

"Therefore, while we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.

"This administration does not intend to sign the Convention on Political Rights of Women. This is not because we do not believe in the equal political status of men and women, or because we shall not seek to promote that equality. Rather it is because we do not believe that this goal can be achieved by treaty coercion or that it constitutes a proper field for exercise of the treaty-making power. . . .

"These same principles will guide our action in other fields which have been suggested by some as a proper area for multilateral treaties."

When the so-called "Bricker Amendment" to limit the domestic effect of treaties in the United States was being considered, the American Bar Association was assured that it could trust the Executive Department not to sign and submit treaties affecting the internal affairs of the United States.

If such treaties as are now proposed for accession or ratification should be approved, it will again become necessary to seek constitutional limitations on the treaty-making power.

No treaty in the human-rights field has as yet been submitted to the Senate since 1949, for ratification or accession, except the three outlined above, dealing with slavery, forced labor and the political rights of women.

There is only one provision in these three Conventions which deals with a matter which on its face could be of such international concern that it would be an appropriate subject for a treaty if the facts warranted a treaty. This is the provision of the Supplementary Slavery Convention relating to the Slave Trade (Articles 3 and 4). It is doubtful, however, whether the facts warrant a further treaty, even relating to the Slave Trade.

A Report of March 21, 1966, of a Special Rapporteur of the United Nations Economic and Social Council on Slavery (U.N. Doc. E/4168/Add.1) disclosed that each of the 75 States of the United Nations which answered his questionnaire denied that a slave trade exists in its territories, in fact or in law.

Each stated that slavery in all its forms has been abolished by it and is prohibited by law. Moreover, by the Slavery Convention of 1926, the parties undertook to suppress and prohibit the slave trade, and to adopt all necessary measures to prevent compulsory or forced labor from developing into a condition analogous to slavery.

No facts appear to have been presented to the Senate to explain why this Convention is necessary or why such domestic practices as debt bondage, serfdom, marriage contracts and inheritance of widows should now be made the subject of international agreement.

Although the domestic practices listed in the Supplementary Convention on the Abolition of Slavery are abhorrent and contrary to the standards of civilization now widely, if not universally, accepted, there is no evidence that they are of such international concern to the United States as to constitute a proper subject for international agreement.

Clearly, there is nothing in this Convention which runs counter to United States domestic law. It does, however, deal not merely with international traffic in slaves, but also with wholly domestic practices which fall within the domestic jurisdiction of states. To legislate internationally with respect to such matters opens the door to an invasion of the domestic jurisdiction of nations which may lead to serious prejudice.

It is not necessary to attempt, in this Report, any prognostication of where the development of such legislation might lead. It is enough to point out that this particular Convention does, apart, as stated, from the provisions dealing with the Slave Trade (Articles 3 and 4), attempt to regulate the domestic social order of states, to dictate what should be disallowed internally, and thus to encroach upon the domestic jurisdiction of the parties to it.

This is the position taken by the United States when this Convention was considered in the United Nations Economic and Social Council in 1956, the Official Records of that Council for April 27, 1956, recording a general debate as to the advisability of a Supplementary Convention on the subject of slavery, reports the following statement by the representative of the United States:

"30. Mr. KOTSCHNIG (United States of America), after referring to his country's record in abolishing slavery, recalled that it had adhered to the International Slavery Convention of 1926, with the reservation that in its view forced labour should not be permitted except as punishment for a crime of which a person has been duly convicted and that it should explicitly exclude forced labour for public purposes. Even at that time, it had taken an absolutist position on slavery—a position which it had since maintained.

"31. The Council was also aware that the United States did not intend to sign or ratify the supplementary convention. There were two reasons for that. The United States did not feel that the convention would serve any useful purpose in its own territory, in which no vestiges of slavery remained; and it did not expect countries which had not adhered to the 1926 Convention to sign the new instrument. In the circumstances, the only way to eradicate slavery would be through education—and in such efforts his country would be happy to co-operate. His delegation did not, however, wish to stand in the way of those who hoped the new convention would prove effective, and he would therefore abstain in the vote of the joint draft resolution."

Similar statement was made by Representative Kotschnig at the Conference of Plenipotentiaries later in the same year.

As will be noted from a discussion hereunder of texts of both a Convention and a Recommendation on Discrimination in Education, adopted by UNESCO on December 14, 1960, the Office of Public Services of the Bureau of Public Affairs of the State Department, issued on November 16, 1961, an explanatory Memorandum in which it was stated that because of constitutional questions, "the Convention is not being considered for ratification by the United States".

Similar observations apply with respect to the Convention concerning the Abolition of Forced Labor. This deals entirely with domestic matters, i.e. with the relation between a state and its own citizens. When a state ratifies the Convention, "it undertakes to suppress and not to make use of any form of forced or compulsory labour" for any of the purposes set out in Article 1. There is no doubt that the objectives are laudable, the practices contrary to our own constitutional and statutory enactments, abhorrent to civilized communities, and proper subjects for condemnation.

The question, however, is whether the United States can, under its Constitution, and whether it should, having regard to fundamental principles, become a party to international legislation of this character which deals entirely with its domestic jurisdiction.

It may be argued that this bridge was crossed when the United States became a member of the ILO. This is not the case, however. Membership in the ILO does not automatically make members parties to conventions adopted by its General Conference. While membership involves discussions and reports of domestic labor situations, there is no legal ordering of local labor relationships in the absence of agreement thereto.

Reference has been made above to the views expressed by the United States representatives at the International Labor Conference at which this Convention was adopted. It is evident on its face that it goes beyond the Supplementary Convention on the Abolition of Slavery. In the former, parties are required merely to "take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment" of the institutions and practices described. This provides some deference to the sovereignty of States with regard to their domestic orders.

The Forced Labor Convention, on the other hand, as noted above, *requires* each party "to suppress" and "not to make any use of" any form of forced or compulsory labor for the enumerated purposes. Each party is also, by Article 2, required "to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1 of this Convention."

The degree of encroachment on the domestic jurisdiction is indicated by the scope of Article 1. This Article covers not only forced or compulsory labor as a means of "political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system," but it also reaches compulsory labor used as a "punishment for having participated in strikes."

Ambassador Goldberg, in his statement of February 23, 1967, said that he was satisfied that the Convention would not preclude the application of penal sanctions for certain kinds of labor activities. It is, however, difficult to perceive why it would not prohibit prison labor as a punishment for participating in

strikes in violation of injunctions, or against public authorities in violation of statutes. Conceivably, the point might be reached when it became necessary for the preservation of the domestic order in this country, or in one of its states, to employ coercive measures to maintain basic and emergency public services.

When the question of a convention on the subject of forced labor came before a Subcommittee on Labor of the House Committee on Labor and Welfare in April 1956, Assistant Secretary of State Francis O. Wilcox said:

"... We do not believe that the treaty-making power is designed to be used to protect citizens of other countries against their government. It is not the proper subject of a treaty for the United States, for example, to try to protect Russian citizens against labor abuses by the Russian Government any more than it is appropriate through the treaty power to give other governments a treaty right to protect United States citizens from what may be considered labor abuses within the United States."

It seemed clear, Mr. Wilcox said, that the proposed forced labor convention would concern itself with national rather than international matters. He pointed out that, in the related field of slavery, questions relating to the international traffic in slavery were appropriate for international control. He did not believe, however, that "the control of slavery within countries is a matter which can or should be regulated by treaties." He added

"Problems of slavery within the countries should be dealt with by the countries themselves. We believe that the same principle applies for forced labor."

Moreover, he said, the State Department did not believe that a convention outlawing forced labor constituted an effective guaranty of its abolition. The USSR, he pointed out, had urged the adoption of "as broad and radical an instrument as possible." This illustrates, he said, "the danger that such a convention may conceivably become an empty gesture, and public opinion be misled into thinking that forced labor has been eliminated."

It was felt that an effective method of combating this matter was through publicizing these practices and mobilizing public opinion to demand their elimination. A recommendation by the ILO, it was believed would serve the purpose of publicizing the practices, and concentrating the pressures of public opinion, on the need for eliminating them.

The third convention, namely that dealing with the political rights of women, goes even further in its attempts to regulate the political régimes of states which become parties to it. It is difficult to conceive of any area more peculiarly within the domestic jurisdiction. To prescribe who shall vote and on what terms, who shall be eligible for election to publicly elected bodies, who shall hold public office and on what terms, is clearly at the very heart of every domestic political system.

Here again, Ambassador Goldberg is satisfied that the Convention would not contravene any of our own domestic laws, but he (as did President Kennedy in submitting the treaty to the Senate for ratification) does advise a statement of "understanding" that the Convention does not prevent the recognition of "natural difference between men and women," and that "public office" and "public functions" are not intended to apply to military service.

The question remains, however, whether, under our Constitution, the political rights of women in this country can be made a matter of international

concern by the ratification of a treaty on the subject with the advice and consent of the Senate.

IV

SOME LEGAL AND POLICY ISSUES

From the above comments on the Conventions now before the Senate for advice and consent to accession or ratification, and from the analysis of other instruments recently concluded in the area of human rights (these are reviewed briefly in Part V of this Report), it is evident that a radical departure from traditional treaty practice is being proposed.

This fact alone is, of course, no ground for objecting to a development that may be in accord with corresponding radical changes in scientific development, economic and political institutions, the development of communications, and in social organizations everywhere. The consequences of accepting it, however, may be far more far-reaching than most lawyers would be willing to accept.

It has nevertheless been asserted notably in hearings before a sub-committee on human rights of the Senate Foreign Relations Committee, that we have, in the past, given our sanction and made ourselves parties to treaties on human rights. The original treaty on slavery, and a treaty on the nationality of married women are the only two examples given.

The early treaties on slavery, however, dealt almost exclusively with the slave trade, and that on the nationality of married women was aimed at solution of differences in holdings by various nations as to nationality of a wife married to a national of another country; both dealing, accordingly with matters clearly of international concern.

The impetus for the promotion and protection of human rights on a global basis was generated by the atrocities of World War II, and found its expression in the Charter of the United Nations. Since the adoption in 1948 of the Universal Declaration of Human Rights, there has been a persistent effort, to which the United States has contributed in major degree, to translate the provisions of that Declaration into binding international commitments, and to provide international machinery for their enforcement.

As observed in Part V of this Report, the high-water mark of this endeavor is the adoption by the General Assembly, in December 1966, of the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights.

The Conventions now before the Senate are forerunners of these more comprehensive instruments, and a large number of related but more limited treaties prepared by the General Assembly and the ILO. Pressures are strong to obtain adherence by the United States to these instruments. In his statement of February 23, Ambassador Goldberg has said, with respect to the three Conventions relating to slavery, forced labor and the political rights of women:

"Adherence to these conventions would underscore the fact that the United States is concerned with the realization of human rights, not only within its shores, but throughout the world. In recent years, we in this country have been engaged domestically in a tremendous effort to advance the rights of our citizens through the processes of law. And that effort, which quite rightfully has held the attention of men everywhere, has reaped tremendous gains for the people of the United States. I do not believe, however, that we can now rest upon these domestic victories, and disclaim interest in the same evils abroad

that we have abrogated at home. It is only fitting that a country which has taken such great strides should play a leading role in the attempt to see human rights respected in all sectors of the globe.

"I would point out, too, that ratification of these conventions would accord with our commitment to the Charter of the United Nations and to the principles for which it stands. Indeed, one of the main purposes of the United Nations is to achieve international co-operation in solving the kinds of problems with which these conventions are concerned. Countless times the United States has spoken publicly in support of the Charter and, specifically, in support of its human rights provisions. Why should we hesitate to ratify conventions that give such provisions a real meaning and force?"

In other statements and declarations, it has been urged that these Conventions are "necessary" for "permanent peace and security"; that they promote human freedom; that this is "an indispensable condition to the achievement of a stable peace"; and that we cannot afford to renounce responsibility for supporting fundamentals that distinguish our concepts from tyranny.

In his statement of February 23, Ambassador Goldberg went on to emphasize that he was not putting forward "purely altruistic reasons for ratification." He said:

"Concern for the welfare of all peoples is a principal feature of our foreign policy. But if the United States is not interested enough in human rights to participate in even modest and broadly supported international conventions, what will be the attitude of those many countries who look to us for guidance and advice? Our views and our declarations will not be taken seriously."

He did not suggest that the present conventions were a panacea, or that they would guarantee complete solutions for the problems to which they were addressed, but he expressed the view that, until the social abuses of discrimination, arbitrariness and inhumanity are eradicated, "we shall not see the dawn of a truly peaceful day."

Quite clearly, there is emotional appeal in the reasons given for supporting these conventions. It is not an enviable task to have to examine this subject—not from the standpoint of the moral issues involved, but from the more prosaic standpoint of constitutional limitations, and what the lawyers of this country should regard as the long-term national interest.

Those who support this Report emphatically affirm their dedication to the cause of human rights and human freedoms, and to the ideals embodied in these and other instruments. The fact that it may be considered unacceptable to participate in international legislation in this area must in no way impair whole-hearted support for resolutions, recommendations and other measures not legally encroaching upon the domain of domestic jurisdiction.

a. Constitutional Difficulties

1. Matters of International Concern

The ambit of the treaty power in its various aspects has been the subject of much comment from early days. Hamilton said, in the *Federalist*: "The power of making treaties . . . relates neither to the execution of subsisting laws nor the enactment of new ones . . ." Calhoun thought the treaty-making powers "strictly limited . . . to questions between the United States and foreign powers

which require negotiation to adjust them." In 1816, in speaking in the House of Representatives, on a commercial treaty with Great Britain, Calhoun said: "A treaty never can do legitimately that which can be done by law . . ."

In his *Manual of Parliamentary Practice*, Thomas Jefferson, our first Secretary of State, wrote of the treaty-making power:

"To what subjects this power extends has not been defined in detail by the Constitution nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a new nullity, *res inter alios acta*. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and *cannot be otherwise regulated* . . ." (emphasis supplied)

The Supreme Court has often spoken of the extent of the treaty power. In *Holmes vs Jennison*, 14 Pet. 540, 10 L.ed. 538 (1840), Chief Justice Taney said:

"The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently it was designed to include all those subjects which in the ordinary course of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments." (p. 569)

This language was repeated by Mr. Justice Clifford, speaking for the Court in *Holden vs Joy*, 17 Wall 211, 243, 21 L.ed. 523-34 (1872); and again by Mr. Justice Davis in *United States vs Lariviere* (43 Gallons of Whisky), 93 US 188, 197, 23 L.ed. 846, 848 (1876).

Probably the case most often cited on the treaty power is *Geofroy vs. Riggs*, 133 US 258, 33 L.ed. 642 (1890), in which Mr. Justice Field restated the scope of that power in somewhat different language:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries." (p. 266)

That the treaty-making power extends to all *proper subjects of negotiation* with foreign governments was repeated in *Ross vs. McIntyre*, 140 U.S. 453, 463, 35 L.ed. 581-85 (1891), and in *Asakura vs Seattle*, 265 US 332, 341, 68 L.ed. 1041, 1044 (1924).

In 1928, the former Associate (and later Chief) Justice of the Supreme Court and Secretary of State, Charles Evans Hughes, was President of the American Society of International Law. At the Annual Meeting in that year, he spoke of the treaty power in the context of problems raised by the Havana Conference on Private International Law. He said:

"Those who are liberal in their interpretation of the scope of the treaty making power I think have the conception of the United States as a sovereign power having foreign relations, or as being

equipped with authority under the Constitution to enter into agreements with other nations in matters which relate to her external affairs or the relations between the United States and other nations.

"It is however quite a different matter to suppose that the treaty making power would extend to a subject which is exclusively internal, as, for example, with respect to the host of questions which we consider as within the field of legislation of a state of the Union."

In his presidential address at the meeting in 1929, Mr. Hughes again spoke at some length on the subject. The power to make a treaty, he asserted, is "the power to deal with foreign nations with regard to matters of international concern . . . It is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty making power."

In 1930, the former Secretary of State became Chief Justice, and in the following year wrote the opinion of the Court in *Santovincenzo vs Egan*, 284 US 40, 76 L.ed. 152, 155, concerning consular treaties with Italy and Persia. Here again the Chief Justice repeated that the treaty-making power was broad enough to cover all subjects "that properly pertain to our foreign relations."

The foregoing statements of the Supreme Court are reflected in opinions of our standard authorities. In his work, *The Treaty Making Power*, Butler says that it "extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world . . ." Crandall says:

"Treaties are contracts between states. To their validity it is essential that the contracting parties have power over the subject matter . . . or that the object of the treaty be possible and lawful under accepted principles of international law."

More recently Professor Edward S. Corwin wrote: "The power to make treaties . . . extends to all proper subjects of negotiation between nations."

Commenting upon the address of Chief Justice Hughes before the American Society of International Law in 1929, Charles Cheney Hyde said:

"These words seem to imply that by the adoption of the Constitution the Republic as a state relinquished the capacity to conclude treaties designed or calculated to restrict the American people in their purely internal concerns, as with respect to matters having no relation to international affairs, and that the existence of an international relationship is to be taken as a test of unrelinquished power."

This is another way of saying that what the Chief Justice meant is that a treaty dealing only with internal matters is unconstitutional.

The Court of Appeals for the District of Columbia had almost the precise question before it in *Power Authority of New York vs Federal Power Commission*, 247 Fed.2d 538 (1957), involving a domestic reservation to the 1950 treaty with Canada for the use of the waters of the Niagara River. The Court, by Judge Bazelon joined by Chief Judge Edgerton, said:

"No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.

"Our present Secretary of State (Dulles) has said that the treaty power may be exercised with respect to a matter which 'rea-

sonably and directly affects other nations in such a way that it is properly a subject for treaties between nations as to how they should act'; and not with respect to matters 'which do not essentially affect the action of nations in relation to international affairs, but are purely internal'. (Hearings on S.J. Res. 1, Before sub-Com. of Senate Jud. Com., 84th Cong. 1st Sess., p. 183 (May 2, 55). He has earlier said:

"'. . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.' (Hearings on S.J. Res. 1 and S. J. Res. 43, 83rd Cong. 1st Sess. 825, April 6, 1953)." (247 F2d at p. 543)

Judge Bazelon then quoted from the address of Chief Justice Hughes before the American Society of International Law in 1929. The opinion concludes:

"In the Dulles view, this reservation, if part of the treaty, would be an invalid exercise of the treaty power. In the Hughes view, its constitutionality would be a matter of grave doubt . . . We construe the reservation as an expression of the Senate's desires and not as a part of the treaty. We do not decide the constitutional question."

The repeated statements of the Supreme Court that the treaty power extends to all *proper* subjects of international negotiation, clearly implies that there are improper subjects of such negotiation, such as one of an essentially domestic nature. Although the Supreme Court has never declared a treaty invalid because of the domestic nature of its subject matter, there is little reason for thinking that it would not do so in an appropriate case.

2. Domestic Jurisdiction

A corollary to the limitation of the treaty power to matters of international concern is the preservation of domestic jurisdiction. This domain is recognized in paragraph 7 of Article 2 of the United Nations Charter:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . ."

It is also a principle of international law that it does not reach that which is "solely a matter of domestic jurisdiction." And Article 36 of the Statute of the International Court of Justice provides that parties to the Statute may declare that they recognize the compulsory jurisdiction of the Court in all legal disputes concerning the interpretation of a treaty, any question of international law, or the breach of an international obligation. In their declarations of adherence to the Statute, many States exclude matters which are essentially, or are by international law, within their domestic jurisdictions.

When a subject falling within the domestic domain of a State, such as its own internal political order, is made the subject of an international agreement, as would be the case in the three conventions before the Senate, the subject matters of these treaties cease to be "matters . . . essentially within the domestic jurisdiction" of the State.

The International Court of Justice would have jurisdiction over disputes arising under the conventions relating to Slavery and the Political Rights of

Women. The Governing Body of the ILO, and, on reference by a government concerned, the ICJ would have jurisdiction over disputes under the Convention on Forced Labor.

Even assuming that it should be considered appropriate to cut down the sphere of domestic jurisdiction to the extent provided in these conventions, the question still remains whether, by so doing (and perhaps later going much further by ratifying other conventions) the door would be opened to intervention by the United Nations in the field of human rights generally, and for this field to fall within the domain of international law despite its domestic character. In this connection, it will be recalled that the Permanent Court of International Justice, in its Advisory Opinion on the Nationality Decrees in Tunis and Morocco, said that the question of domestic jurisdiction is "essentially relative."

It is doubtless regarded by many that the sphere of human rights is no longer of purely domestic concern, but that the United Nations, and the international community generally, are concerned not only with the promotion of human rights and fundamental freedoms, but also with their preservation and the enforcement of penal sanctions relating thereto.

* * *

It is the view of the Committee that international relations have not yet reached the stage at which the United States should surrender its exclusive jurisdiction over the regulation of its own internal order and the relations between its own national and local governments and their citizens. It is submitted that the cause of human rights neither justifies nor requires participation in treaties which would prejudice the domestic jurisdiction of the United States and the federal/state structure.

The federal Government, being a government of limited powers, is still precluded from regulating large areas of intrastate matters. It is unnecessary and unsound to cut down this area of intrastate jurisdiction over human rights through the medium of international agreements. If that area is to be cut down, the way to do it is through internal legislation, debated and concluded by representatives of the people concerned, and not by a heterogeneous international gathering of officials representing some 125 different countries, each with its own concept of internal social standards.

It is argued that no such subversion of the domestic jurisdiction would result from adherence by this country to commitments that do not go beyond legal norms already established by our federal and state constitutions. Granted that the treaties under consideration do not impose novel standards on our own internal governments, participation in them would open a wide area of domestic jurisdiction to international regulation, and would thus seriously prejudice our concept of domestic jurisdiction in other matters.

Once the door has been opened to international regulation of such an area of relations between a State and its own citizens, the existing limitation on the treaty power to matters of "international concern," and the exclusion from matters essentially within the domestic jurisdiction, would become a mirage and not a limitation at all. Those supporting this report cannot accept such a revolutionary change in our legal structure.

3. *Where to Draw the Line*

Admittedly, the line of demarcation between matters of "international concern" and those falling exclusively within "the domestic jurisdiction" is blurred and not too well defined. As noted above, the Permanent Court of

International Justice has referred to this as "an essentially relative question." Matters which have traditionally been regarded as solely within the "domestic jurisdiction" of a state may, in the course of time and by virtue of extensive international concern with them, become matters of "international concern and, therefore, appropriate subjects for treaties.

At the same time, it must be recognized that a line does exist. The field is not wide open for international legislation by international institutions on any domestic matter.

It is sophistry to insist that matters cease to be domestic whenever they are made the subject of international agreement.

The regulation by a state of relations between it and its own citizens, or (to put the same matter in other terms) the ordering of internal relationships within and by a national or local community, constitutes the very essence of domestic jurisdiction. It is ironic that the Covenants on Human Rights should each open with a declaration of "self-determination." What substance can there be in the right of all "peoples" to "freely determine their political status and freely pursue their economic, social and cultural development," if their domestic affairs are to be subject to supervision and regulation by international bodies?

As Sir Hartley Shawcross said in the debates in 1946 on the treatment of Indians in South Africa, the action then being contemplated would become a precedent, and it was necessary to realize where the proposed intervention would lead. He said that the United Nations ought to be "authoritatively informed on the legal position," and he urged submission to the International Court of Justice for an advisory opinion. "Some matters," he said, "could be made the subject of humanitarian intervention under international law, but other matters were obviously domestic, and there was no question of the exclusive jurisdiction of a State in regard to them." Until a code of standards was drawn up and adhered to, it was "clearly a matter for the domestic jurisdiction of every State to decide what rights it should grant its citizens."

It is submitted that here is where the line is still drawn under our constitutional system, and that here is where it should remain.

b. Other Legal and Some Policy Considerations

1. Problems of Enforcement

It has been noted that, in the case of two of the conventions now before the Senate, disputes may be referred to the International Court of Justice "for decision," and in the other to the Governing body of the ILO, subject to possible submission to the International Court.

Whatever provisions there may be for decision and enforcement, it would clearly be inadvisable at this time to superimpose a fourth level of adjudicatory machinery and enforcement upon the serious civil-rights problems existing in the United States. We already have local enforcement, state enforcement, and federal enforcement.

Probably no other country in the world has as much civil-rights legislation as has been enacted in the United States during the last ten years. In no other country is enforcement more active and effective.

It will take many years for us to determine and evaluate the consequences of the civil-rights legislation now on the statute books of the United States. How can it be said that we now need, in addition, international legislation, international decision-making, and an international level of enforcement?

In August 1966, Attorney General Ramsey Clark, then Deputy Attorney General of the United States, testified before the Un-American Activities Com-

mittee of the House in opposition to HR 12047 of the Eighty-ninth Congress. He said:

"Any unnecessary law is undesirable. This is particularly true in our complex times. The bill under consideration is undesirable for more reasons than lack of necessity. Principal among these are: 1. Its injection of federal law and federal enforcement into essentially state and local affairs . . ."

Attorney General Clark's reasoning is applicable *a fortiori* to the proposal to superimpose a fourth level of law, decision-making and enforcement into the human-rights area in the United States.

Of the present large membership of the United Nations, there are many who do not share our political ideals. The debates in the United Nations on the human-rights conventions disclose vast gulfs of misunderstanding and disagreement. At times the debates have been acrimonious and highly political. There are those who would overlook no opportunity to use the enforcement provisions of the human-rights conventions to embarrass or to attack us.

Moreover, the current political structure of the United Nations is today radically different from what it was twenty, or even ten, years ago. Today there are 122 members, of which only 25 may be classified as European and North American. The balance is made up of 25 Asian, 37 African, 23 Latin American and 12 Communist States.

2. *Adequacy of Recommendations*

* * *

3. *Irrelevance of Other State Attitudes*

We are exhorted to ratify the Human-Rights Conventions or lose our moral leadership of the free world, which is committed to the fundamental freedoms.

Of the states which have signed and ratified these Conventions, few, if any, have a constitutional provision like our Article VI which makes a treaty the law of the land. We are not told how many, if any, of the ratifying states have enacted municipal legislation implementing the Conventions.

Many countries, including Cuba, are parties to the Convention on the Abolition of Forced Labor. Thousands of Cubans who opposed Castro are held in forced-labor camps. The existence of that treaty, and Cuba's adherence thereto have had no effect whatever in restoring the human rights of these victims of Castroite brutal injustice.

In the last analysis, as an entirely practical matter, the making of these treaties is really an exercise in futility. Most of the states which sign and ratify them are already in compliance with their requirements. It accomplishes little for States A and B to enter into an international covenant to observe rules which are violated only in State C not a party to the compact.

Further, many countries are prodigal in signing treaties, but parsimonious in making them domestic legislation by legislative enactment. For them, signing a treaty may be a purely hortatory act, of no domestic legal significance, and of no more effect domestically than assenting to the Universal Declaration. But in the United States a treaty has the quality of a legislative enactment, and adherence, for hortatory purposes only, is improper.

A common argument for ratifying the human-rights conventions is that our failure to do so renders us vulnerable to charges of hypocrisy by the Soviet and other governments. With our 13th and 14th Amendments to the Constitu-

tion, what difference does it make what the Soviets say about our failure to ratify the Supplementary Conventions on Slavery and Forced Labor? With our 19th Amendment, what difference does it make what the Soviets say about our failure to ratify the Convention on Political Rights of Women? The constitutions of nearly all of the Communist states contain declarations of human rights. But it is common knowledge how their practice differs from their precept.

The actions of the Soviet and other governments which have signed the human-rights conventions, in opposing all measures of implementation, is eloquent of their own hypocrisy. The Soviet bloc has consistently opposed all measures of implementation of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights as violative of Article 2(7) of the Charter.

There is no better illustration of the real Soviet attitude on human rights than the arguments made by Soviet representative P. D. Morosov against the proposal of Costa Rica to establish a United Nations High Commissioner for Human Rights. Consistently with Soviet opposition to all measures of implementation, this proposal was attacked as violating Article 2(7) of the Charter, and as "intolerable." "Let us leave matters of implementation as they have been for a thousand years," he said. As stated by the United States representative, Morris Abram, before the Human Rights Commission on March 30, 1966:

"The distinguished representative of the Soviet Union has said that if the office of the High Commissioner for Human Rights is created, if it is finally approved by the General Assembly, then his delegation will disassociate itself from the process. He has said that they would not finance it and would not contribute to it. I further understand that they have taken the position that they will not work with any ad hoc committee of this group established to study further the role of such a High Commissioner."

The United States need not make themselves party to treaties of doubtful validity purely to demonstrate our devotion to human rights. That devotion is firmly established by our Constitution, by adherence to the Charter with its Articles 55 and 56, by acts of Congress, and by decisions of our Supreme Court.

It has been suggested that failure to ratify the Conventions would be inconsistent with our obligations under the Charter. It is true that Article 56 of the Charter commits us to take action in cooperation with the Organization for the achievement of the ideals set forth in Article 55, of which subparagraph c relates to human rights.

Articles 55 and 56 are a formal assumption of institutional competence by the United Nations. They do not remove the matters with which Article 55 deals from the realm of domestic jurisdiction, and make them subject to international law. The United States delegates have made several pronouncements on these sections which indicate that it is still the right of the individual state to determine its own relations to its own citizens, but the state is obliged to promote and not destroy human rights. By the Charter, the state has merely assumed an obligation "to exercise its judgment in honesty and good faith."

That the United States has complied with its obligation under Articles 55 and 56 cannot be doubted. Article 56 does not obligate the United States to contract international obligations which do not accord with our Constitution. There is no inconsistency with the Charter in not doing so.

Many of the human-rights covenants are based on preambles which express

universal recognition of the right of self-determination of the economic, social, cultural and political structure of the people of each nation.

And then, in direct contravention of that right of self-determination, these covenants seek to force upon them social and moral standards alien to the traditions under which they seek to develop their own social structures.

We should rather, as suggested by a former Secretary of State, while encouraging "the promotion everywhere of human rights and individual freedoms . . . favor methods of persuasion, education and example, rather than formal undertakings which commit" some other country to accept our standards.

V

INSTRUMENTS NOT YET SUBMITTED TO THE SENATE

Several human-rights conventions which have been prepared by the General Assembly of the United Nations, or adopted by the General Conference of the International Labor Organization, have not yet been submitted to the Senate for advice and consent to their ratification.

These include the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly on December 21, 1965 and signed by the United States on September 28, 1966; the International Covenant on Economic and Cultural Rights adopted by the General Assembly on December 16, 1966, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, also adopted by the General Assembly on December 16, 1966.

A Draft Convention on the Elimination of All Forms of Religious Intolerance and a Draft Convention on Freedom of Information are still in the course of preparation by the General Assembly.

Although no action is yet called for by the Senate with respect to these instruments, it is pertinent to examine some of them to understand the radical direction being taken by the international human-rights movement now under way. Undoubtedly, if the Conventions now before the Senate are ratified, and segments of domestic jurisdiction are thus internationalized, the door will have been pushed open for the Convention on Racial Discrimination (which the United States has signed), as well as the broad Covenants on Human Rights, and other legislation now completed or under consideration.

a. International Covenant on Economic, Social and Cultural Rights

* * *

c. Convention on the Elimination of All Forms of Racial Discrimination

The text of this Convention was adopted by the General Assembly on December 21, 1965. As of March 1, 1967, it had been signed by 54 States and ratified or acceded to by 7. It was signed by the United States on September 28, 1966.

The substantive part of the Convention requires States Parties to it "to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms, and promoting understanding among all races . . ."; "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions, and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation"; "not to sponsor, defend or support racial discrimination by any persons or organizations"; to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wher-

ever it exists"; to "prohibit and bring to an end, by all appropriate means . . . racial discrimination by any persons, groups or organizations"; and when circumstances warrant, to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms" (Art. 2).

Racial segregation and apartheid are particularly condemned, and the parties to the Convention undertake "to prevent, prohibit and eradicate, in territories under their jurisdiction, all practices of this nature" (Art. 3). They also condemn "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin" over any other, and "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination . . ." (Art. 4).

By Article 5, the States Parties "guarantee the right of everyone . . . (to) the enjoyment of certain rights, including "universal and equal suffrage"; "the right to freedom of opinion and expression"; "the right to freedom of peaceful assembly and association"; "the right to work, free choice of employment, just and favourable conditions of work, protection against unemployment, equal pay for equal work, just and favourable remuneration"; the "right to form and join trade unions; the right to housing; the right to public health, medical care and social security and social services; the right to education and training; the right to equal participation in cultural activities"; and "the right to access to hotels, restaurants, cafes, theatres, and parks."

A great many sessions were devoted to measures of implementation, particularly provisions relating to petitions or communications from "individuals or groups of individuals . . . claiming to be victims of a violation . . . of any of the rights set forth in this Convention."

Article 14, as finally adopted, would (a) limit such communications to States Parties which declared their recognition of the competence of the Committee on the Elimination of Racial Discrimination (established by Article 8) to receive and consider communications from individuals or groups of individuals within their respective jurisdictions, and (b) require the exhaustion of "all available domestic remedies" (unless "the application of the remedies is unreasonably prolonged").

Following the adoption of these provisions relating to private petitions, proposals were introduced to provide for petitions from the inhabitants of Trust and Non-Self-Governing Territories. This was said to represent the consensus of the entire African group, and that that group was "in no mood to accept substantive amendments" and "did not expect colonialists or neo-colonialists to accept it." The British and Belgian representatives said that it would impose obligations "that no other international convention or international treaty had ever imposed on a state," and Miss Willis, representing the United States, said that it "went against the law of international treaties." It was nevertheless adopted by a vote of 76 to 3 (Australia, Portugal and the United Kingdom), with Belgium, the United States and ten other States abstaining.

At the instance of Canada, a provision for "reservations" was rejected, notwithstanding views expressed by representatives from Ghana, Venezuela and Uruguay that the absence of such a clause "would seriously weaken the Convention." A Federal-State clause was also rejected, the United States voting for rejection (see post).

A provision for adjudication of disputes by the International Court of Justice, in the absence of agreement to another mode of settlement was adopted, after some discussion of a Polish proposal to require the unanimous consent of all of the parties to a dispute to determination by this method.

At the time of signing this Convention, Ambassador Goldberg issued a statement in which he said that it "accords with the objectives of the United States," and that:

"Bold and courageous action is indeed required if mankind is to eradicate the ancient evil of discrimination. Only thus will the United Nations truly succeed in building an international community based on respect for law and justice, a community that recognizes human rights at the core of all its endeavors.

"When that recognition is universal, not only in principle but in practice—when each nation combats discrimination not only in its words at the United Nations but with its deeds at home—then the search for a new and harmonious world order will have taken an immense stride toward fulfillment."

He also emphasized the Constitutional guarantee of free speech by circulating the following statement:

"The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America."

* * *

d. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*

This Convention was adopted by the General Assembly of the United Nations on November 7, 1962. The parties to it agree that "no marriage shall be legally entered into without the full and free consent of both parties"; that legislative action will be taken "to specify a minimum age for marriage"; and that "all marriages shall be registered in an appropriate official register."

The Convention was signed by the United States on December 10, 1962, as stated in a footnote to an official copy thereof, "with the understanding (*inter alia*) that legislation in force in the various States of the United States of America is in conformity with this Convention . . ." The treaty has not been submitted to the Senate for advice and consent to ratification.

e. *Convention for the Suppression of . . . Prostitution*

* * *

i. *Convention on the Recovery Abroad of Maintenance*

On June 30, 1956, the United Nations Conference on Maintenance Obligations, meeting in New York, adopted the "Convention on the Recovery Abroad of Maintenance," to enable a person in one country, who claims to be entitled to support by a person in another country, to recover such support effectively through governmental agencies to be established by the states which become parties to the convention.

A "Transmitting Agency" in the country of the claimant would forward

his claim to a "Receiving Agency" in the other country, for enforcement in accordance with procedures set up in the convention, the remedies so provided always to be in addition to those "available under municipal or international law."

This Convention, probably within the normal field of the treaty-making power of the United States, has never been signed in behalf of this country, and has never been submitted to the Senate for advice and consent to accession.

j. *Convention on the Nationality of Married Women*

Another of the multi-partite human-rights treaties apparently outside the domestic jurisdiction and within the legitimate treaty-making power of the United States, is the "Convention on the Nationality of Married Women," adopted in the United Nations on February 27, 1957.

The stated purpose of this Convention is "to co-operate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex," by providing that

1. Neither celebration nor dissolution of a marriage between a national and an alien, nor the husband's change of nationality during marriage, shall automatically affect the nationality of the wife;
2. Neither acquisition of another, nor renunciation of a nationality by the husband shall prevent retention of her nationality by the wife;
3. The wife of a national may acquire her husband's nationality by privileged procedures, subject to limitations required by security or public policy; but
4. Nothing in the convention is to be construed as affecting national legislation or case law under which a wife may acquire her husband's nationality as a matter of right.

The treaty has apparently never been signed by the United States, and has never been transmitted to the Senate for accession.

k. *Declaration on the Right of Asylum*

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VI

FEDERAL-STATE CLAUSES

Some of the conventions outlined above, in various stages of preparation, consideration, accession or ratification, contain federal-state clauses. Under such a clause, a federal government, party to the convention, would be obligated to comply with those of its provisions within its federal constitutional competency, and to recommend to its constituent states that they enact legislation, or take other steps to implement those provisions of the convention which, under the federal constitutional system involved, lie within their respective exclusive local jurisdictions.

* * *

On the other hand, a number of the human-rights conventions which have been opened for signature, contain no federal-state clauses. This is true, for instance, of the "Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages," and of the "Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others." It is also true of the newly completed Convention on the Elimination

of All Forms of Racial Discrimination. A federal-state clause prepared by the UN Secretariat was rejected, the United States voting in favor of a Polish proposal that such a clause be omitted.

In the latter instance, Ambassador Willis of the United States to the United Nations, stated in the Third Committee of the General Assembly that "although her country had a written constitution, her delegation nevertheless agreed with the representative of Poland who, in introducing his amendment, had said that such clauses tended to destroy the uniform application of international agreements by placing federal states in a special position. Her delegation," she said, "would therefore vote in favor of the Polish amendment."

On December 30, 1965, the Chairman of your Committee addressed the Secretary of State, reminding him that "the United States has stood for a federal-state clause in practically all such treaties in which it has participated," and requesting "an authoritative statement" as "to this apparent change of United States policy."

In reply, Mr. Leonard C. Meeker, the Legal Adviser to the Department of State, advised your Committee that in 1962, "after full consideration of the merits of our traditional support for Federal-State clauses in human rights conventions, it was decided not to propose or support the inclusion of such a clause" in such conventions. Mr. Meeker explained that "the foregoing conclusion was reached in light of the fact that there is little support in the United Nations General Assembly for the inclusion of Federal-State clauses in human rights conventions."

"It is questionable," he said, "whether the United States would wisely invest its efforts in endeavoring to secure the adoption of Federal-State clauses in human rights conventions, when those efforts promise to fail and when United States influence may be more productively directed to securing satisfactory substantive provisions."

As to the treaties, if ratified without the federal-state clauses, the question must ultimately inevitably be raised as to whether a treaty may override the Constitution of the United States, to the extent, at least, of bringing within the jurisdiction of the federal government, subjects theretofore within the exclusive competence of the states. See *Missouri vs Holland*, 252 US 416.

The position apparently taken by our Department of State on this point is shocking. The United States is still a federation of states. If any attempt to alter our form of government is to be made through the use of the treaty-making power, the people of the United States should be so advised.

The fact that "there is little support in the United Nations General Assembly for the inclusion of federal-state clauses in human rights conventions" is not pertinent to whether or not we wish to change our form of government.

The distinction between Federal and State jurisdiction in the United States should be maintained until the people of the United States affirmatively express their wish to abolish it.

VII

JURISDICTION OF INTERNATIONAL COURT OF JUSTICE

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VIII

PROGRAM FOR THE INTERNATIONAL YEAR FOR HUMAN RIGHTS

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IX

RECOMMENDATIONS vs CONVENTIONS

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CONCLUSION

On the basis of all of the facts, and for all of the reasons, outlined above, the Committee on Peace and Law Through United Nations recommends that the American Bar Association, through its House of Delegates, go on record as supporting fully, promotion by the United States, through the United Nations, of universal respect for, and observance of, human rights and fundamental freedoms for all people within all countries, and as favoring United Nations recommendations on human rights and fundamental freedoms, but as opposed to accession by the United States to, and ratification by the United States of, international covenants on human rights having no direct relationship to the external affairs, and lying essentially within the domestic jurisdiction, of the United States.

The Committee further recommends against ratification by the Senate, of the Supplementary Slavery Convention, the Convention on the Abolition of Forced Labor and the Convention on the Political Rights of Women.*

Respectfully submitted,

STANDING COMMITTEE ON PEACE
AND LAW THROUGH
UNITED NATIONS

Eberhard P. Deutsch, Chairman
Victor C. Folsom
Sedgwick W. Green (dissents in part—post)
Alfred J. Schweppe
Ethan A. H. Shepley
Leonard v.B. Sutton
Bruno V. Bitker (dissents—post)

George W. Haight
U.N. Observer
(concur)

By Mr. Green:

I agree that treaties should not deal with domestic matters. However, I believe that the Supplementary Slavery Convention and the Convention on the Abolition of Forced Labor deal with a subject traditionally considered within the scope of the treaty power, both because of the need to suppress the international slave trade and because of the effect of slave labor on international trade.

By Mr. Bitker:

SUMMARY

The United States has committed itself, by treaty, to promote human rights among nations. This country's obligation, however, is limited by the requirements of the Constitution relating to treaties. Pursuant to that commit-

* As stated above, the Association has already gone on record in opposition to ratification of the Genocide Convention.

ment, it has signed four treaties on specific rights on which the President has requested the Senate's advice and consent to ratification. These treaties cover matters not prohibited by the Constitution. The treaties are on subjects which are proper for negotiation with foreign nations. They further the interest of the foreign policies of the United States.

* * *

THE EXISTING COMMITMENT TO FURTHERING HUMAN RIGHTS

THE BREADTH AND THE LIMITATIONS OF TREATY POWER

* * *

The power to enter into treaties is broad under our Constitution (Article II, sec. 2). The President may make treaties "with the Advice and Consent of the Senate." The supremacy of treaties as the "law of the land" is clear (Article VI, Cl. 2). The vast scope of the treaty power has been judicially recognized in this country almost since the Constitution was adopted. As early as 1796, in *Ware v. Hylton*, 3 Dall. 199, the Supreme Court affirmed the power when, by the provisions of the peace treaty with England, it prevented a state from wiping out debts due to British subjects.

Concededly, however, the treaty power is not without limitation. It does not rise above the Constitution. The Supreme Court has said, in *Reid v. Covert*, 354 U.S. 1 @ 17 (1957) that:

"The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined . . . This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty."

Treaties must, of course, concern matters which are properly negotiable between nations. The extensive treaty power which exists, subject to the restraints in the Constitution itself is thus expressed in *Geofroy v. Riggs*, (133 U.S. 258 @ 267):

"It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."

The Court subsequently restated the rule in *Asakura v. Seattle*, 265 U.S. 332 @ 341, when it said that while the treaty making power "does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiations between our government and other nations."

Obviously, treaties declaring mass murder an international crime, preventing slavery and forced labor, securing the political rights of women, would not authorize something which the Constitution forbids.

The fact that the objectives of these particular treaties are attained by our own Constitution has been suggested as making it unnecessary to enter into international agreements on the same subjects. With respect thereto, President Kennedy, in his letter to the Senate transmitting the three treaties said:

"United States law is, of course, already in conformity with these conventions, and ratification would not require any change in our

domestic legislation. However, the fact that our Constitution already assures us of these rights does not entitle us to stand aloof from documents which project our own heritage on an international scale."

ARE THESE TREATIES MATTERS OF INTERNATIONAL CONCERN?

The only question of substance, therefore, that can be raised as to these four treaties is whether they are "properly the subject" of international negotiation. What is a proper and natural and obvious subject for such negotiation may be something of which we had no conception a few decades ago. What was considered solely a matter of domestic interest yesterday, today is a subject of vital concern between nations.

* * *

A recent analysis on the constitutionality of related treaties is contained in the Restatement of Law (2d), Foreign Relations Law of the United States, American Law Institute, 1965. The reporter's note to Section 118, "Scope of Treaty," page 375, reads:

"Treaties relating to human rights. Proposed treaties dealing with human rights have raised questions in the U.S. and, indeed, in other countries as to whether or not they deal with matters that are appropriate for settlement by agreements between nations. The issues are not unlike those presented by international labor conventions under the constitution of the International Labor Organizations. Although such conventions generally specify standards already observed in the U.S., it has an interest in seeing that they are observed by as many states as possible, not merely to protect its own standards but to promote conditions abroad that will foster economic development and democratic institutions that are conducive to prosperity in the U.S. and achievement of its foreign policy objectives. It cannot effectively urge other states to adhere to such conventions without doing so itself."

* * *

THE RELATIONSHIP BETWEEN PEACE AND HUMAN RIGHTS

HISTORICAL PRECEDENTS

Man has long recognized that there are standards of justice and humanity which transcend all local boundary lines. They are, in the words of the Universal Declaration of Human Rights, "a common standard of achievement for all peoples" which all nations must honor. Over the centuries, in one manner or another, nations have recognized that rights of man are proper subjects for agreements between nations. Such agreements may not have the sophistication of the treaties now under consideration, but history is full of agreements in the general area. The Christian states of Europe and the Mohammedan rulers long ago entered into agreements covering religious freedom. There are many treaties for repressing slavery and slave trade, for improving conditions of labor, for preventing white slavery, for policing the opium trade. There were the "minorities treaties" after World War I and there are provisions in certain peace treaties concluded since World War II for the protection of minorities.

The idea that the denial of human rights and other anti-social conduct are proper subjects of international concern was accepted and acted on long ago by the United States. We have made treaties prohibiting white slave traffic, traffic in arms, traffic in narcotic drugs and, as to specific issues at hand, the

United States is now a party to the international treaty of 1926 to suppress slave trade and slavery as well as to the treaty on the Nationality of Women.

Among the variety of matters deemed proper for treaty ratification by the United States is the one sustained in *Missouri v. Holland*, 252, U.S. 416 (1920). The Court held that a treaty for the protection of migratory birds which fly over Canada and the United States was a proper exercise of the treaty-making power and federal legislation thereunder. It is almost ludicrous to assert that the lives of migratory birds can be protected by a treaty, but that the lives of human beings cannot be under a genocide treaty.

It seems late in the day to suggest that the United States may not now enter into treaties relating to human rights which in fact it committed itself to do twenty-one years ago when the United Nations Charter was ratified. If there was any doubt prior to World War II on whether human rights were a proper subject for agreements between nations, that doubt was resolved at the end of the war by the President and by the Senate of the United States. If the treaties relating to minorities adopted after World War I are not considered precedents so far as our own country is concerned (though they obviously are in the world at large), then what we agreed to at the close of World War II when the United States ratified the Charter, must certainly have meaning.

It is difficult to conceive what more need be spelled out to indicate our recognition that human rights are a matter of negotiations between nations. As Philip C. Jessup, now a member of the International Court of Justice said in his *Modern Law of Nations* (p. 91):

"It is already law at least for members of the United Nations, that respect for human dignity and fundamental human right is obligatory. The duty is imposed by the Charter, a treaty to which they are parties."

THE RELATIONSHIP OF THE FOUR TREATIES TO FOREIGN AFFAIRS

As to Genocide, this appears so fundamental as to require merely a reference to its objectives to establish its relevance under the United Nations Charter as well as our country's foreign relations. Genocide is not new to history. It occurred long ago with the mass extermination of Christians by the imperial government of Rome. It reached an unbelievably low level of butchery by the Nazis in the extermination of six million Jews under Hitler. These events, related to World War II, so shocked the conscience of mankind that civilized society determined that such conduct must be outlawed by the world community of nations.

The disturbance to our peace and security, to our economic well-being, and even to ordinary relationships with other nations which follow genocide, has now been established historically. New examples are neither needed nor wanted. Crimes against humanity are not local in nature; they must be outlawed internationally.

As to the three Kennedy treaties, it is obvious that slavery and forced labor have a direct economic interest since they affect our country's competitive position in the world market. This alone suffices to make them of concern to us internationally. The Political Rights of Women may not be of the same international economic significance. But the relevance of sex distinctions as affecting the community of nations is attested by the direct references in the United Nations Charter. It is specifically recognized as a subject for negotiation between nations by its inclusion in the treaties of peace, for example, between the United

States and Italy, Roumania, Bulgaria and Hungary (TIAS 1648 to 1651). It is particularly significant that the rights of women appear in peace treaties since that indicates that the matter is one of essentiality to political stability. The Treaty on the Nationality of Women, ratified in 1934 after Senate approval, is another example of our government's previous commitment to rights without sex distinction.

The fact is that it is in the interests of the United States to have the standards embodied in all three treaties adopted by as many nations around the world as possible. In President Kennedy's letter of transmittal of these treaties he summarized the obligation upon us when he said: "The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concept of government from all forms of tyranny."

* * *

CONCLUSION

Human rights treaties, covering matters not forbidden by the Constitution and which are on subjects judged by current standards to be matters for international understandings, are constitutional. The four pending treaties, by their nature and effect, cover such subjects. As a matter of policy the United States, with its existing high standards for the protection of human rights, should do all it can to raise these standards everywhere. One way is to set the pattern by ratifying the four treaties. The American Bar Association, in the great tradition, should assume leadership in bringing this about.